Editor's note: 89 I.D. 561

CHAMPLIN PETROLEUM CO.

IBLA 81-166 Decided October 29, 1982

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting oil and gas lease application W-72946 for certain lands within a railroad right-of-way.

Reversed and remanded.

1. Act of May 21, 1930 -- Mineral Leasing Act: Lands Subject to -- Oil and Gas Leases: Rights-of-Way-Leases -- Rights-of-Way: Generally

   Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1976), and 43 CFR 3100.0-3(d)(1).

2. Act of May 21, 1930 -- Oil and Gas Leases: Applications: Description -- Oil and Gas Leases: Rights-of-Way Leases

   An oil and gas lease issued under the Mineral Leasing Act of 1920 does not include the oil and gas deposits underlying a railroad right-of-way, which

crosses the leased tract, even though the lease does not expressly except such deposits from its coverage.

3. Administrative Authority: Generally -- Administrative Practice -- Bureau of Land Management

Established and longstanding Departmental interpretations relating to issuance of oil and gas leases are binding on all Departmental employees until such time as they are changed by competent authority.

APPEARANCES: Lawrence P. Terrell, Esq., Denver, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Champlin Petroleum Company (Champlin) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 24, 1980, which rejected its oil and gas lease application under the Right-of-Way Leasing Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1976), for lands underlying rights-of-way W-0200642 and W-0200644. The application was rejected for the reason that the applied for lands were not available for leasing because they were included in existing oil and gas leases W-36324 and W-40091.

The record shows that on October 8, 1980, Champlin applied to lease certain lands within sec. 24, T. 20 N., R. 93 W., sixth principal meridian, Wyoming, which were originally granted to the Union Pacific Railroad Company (Union Pacific) under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1970) (repealed in 1976). Champlin had acquired Union Pacific's

rights to obtain oil and gas leases under the Act of May 21, 1930, supra, by an assignment executed July 18, 1980. BLM rejected the lease application stating that "[t]he lands under the above-referenced rights-of-way are presently leased under oil and gas leases W 36324 and W 40091 which issued under the Mineral Leasing Act of 1920." BLM indicated that the leasing of these lands under the Mineral Leasing Act of 1920 had been recently supported by a memorandum from the Regional Solicitor in which he concluded that there is concurrent or overlapping authority for a leasing of all rights-of-way lands with the exception of those granted pursuant to railroad land grants made before 1871. Oil and gas deposits under those rights-of-way may be leased only under the 1930 Act. He stated all other oil and gas deposits underlying rights-of-way may be leased under either the 1930 Act or the Mineral Leasing Act of 1920. Memorandum from Regional Solicitor, Rocky Mountain Region, to BLM State Directors, Colorado and Wyoming, dated May 16, 1980.

Champlin has appealed this rejection of its application requesting that the BLM decision be reversed because the outstanding leases covering right-of-way lands had improperly been issued under the 1920 Act. Appellant cites numerous Departmental cases as well as 43 CFR 3100.0-3(d)(1) for the proposition that oil and gas under right-of-way lands may be leased only under the Act of May 21, 1930, supra, and asserts, therefore, that BLM lacked the authority to take action to lease the lands under the 1920 Act.

Counsel for BLM has responded on behalf of BLM urging the Board of Land Appeals to reexamine the applicability of the Mineral Leasing Act of 1920 as a vehicle for leasing right-of-way lands. He requests the Board to

overlook prior decisions on this matter and to accept his view that, under the clear language of these Acts, the Secretary has full discretionary authority to lease oil and gas deposits beneath rights-of-way under either law. We reverse.

[1] First of all, we will examine the theoretical basis for the view by the Regional Solicitor that oil and gas deposits underlying railroad right-of-ways issued under the 1875 Act, are leasable pursuant to the general provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976). A short historical framework is necessary to place the Regional Solicitor's argument in perspective.

Commencing in 1850 with the grant to the Illinois Central Railroad, Act of September 20, 1850, 9 Stat. 466, and continuing for a period of approximately 20 years, concluding with a grant to the Oregon Central Railroad, Act of May 4, 1870, 16 Stat. 94, Congress sought to stimulate and foster the construction of railroads, particularly in the then uninhabited territories of the West. As an inducement to the construction of the railroads Congress granted both a right-of-way through the public lands as well as additional grants of the public domain. In particular, the railroad grants to the Union Pacific in 1862 and to both the Union Pacific and Northern Pacific Railroad Company (Northern Pacific) in 1864 involved vast amounts of public land. Indeed, the 1864 grant to the Northern Pacific, Act of July 2, 1864, 13 Stat. 365, aggregated an estimated 40,000,000 acres of land. 1/

1/ While these grants could well be characterized as "lavish," as indeed they were by the Supreme Court in Great Northern Ry. v. United States, 315 U.S. 262, 273 (1942), they were, for the most part, products both of a

With the completion of the transcontinental railroads in 1869, however, public sentiment turned rapidly against continuing this practice of granting large tracts of the public domain to railroad companies. A series of individual authorizations for railroad rights-of-way over the public lands were enacted between 1871 and 1875. No land grants accompanied these authorizations. See, e.g., Act of June 8, 1872, 17 Stat. 339.

Finally in 1875, in order to obviate the need for individual Congressional authorization, Congress adopted the General Railroad Right-of-Way Act of 1875, Act of March 3, 1875, 43 U.S.C. § 934 (1970). 2/ This granted the right-of-way through public lands to the extent of 100 feet on each side of the central line of the road, but granted no public lands as an inducement for construction of the railroad. Moreover, section 4 of the Act, 43 U.S.C. § 937 (1970), provided that all such lands over which the right-of-way passed would be disposed of "subject to such right of way."

In construing the nature of the pre-1871 grants, the Supreme Court recognized early that more than a mere easement was granted insofar as the right-of-way was concerned. Thus, in New Mexico v. United States Trust Co., 172 U.S. 171, 184-85 (1898), the Supreme Court referred to the interest granted as "real estate of corporeal quality." In Northern Pacific Ry. v.

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fn. 1 (continued)
concern that without adequate transportation facilities the vast territories of the West would remain unpeopled and undeveloped as well as a fear, especially during the Civil War, that the Pacific Coast settlements might be subject to foreign depredations. See generally United States v. Union Pacific R.R., 91 U.S. 72, 79-80 (1875).

2/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793.

Townsend, 190 U.S. 267 (1903), it was stated that the grant "was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." Id. at 271. 3/

Departmental adjudications, however, both before and after these pronouncements, construed both the specific grants after 1871 and the General Railroad Right-of-Way Act of 1875, supra, as granting merely an easement. See, e.g., Grand Canyon Ry. v. Cameron, 35 L.D. 495 (1907); John W. Wehn, 32 L.D. 33 (1903); Pensacola and Louisville R.R., 19 L.D. 386 (1894). Thus, unlike the pre-1871 grants whereby the land within the right-of-way ceased to be public land, the land embraced in the post-1871 grants was deemed to be public land, though subject to the right-of-way. Compare Melder v. White, 28 L.D. 412, 419 (1899), with Circular of May 21, 1909, 37 L.D. 787, 788.

In 1915, however, the Supreme Court stated, in a case involving the 1875 Act, that:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Rio Grande Western Ry. v. Stringham, 239 U.S. 44, 47 (1915). In light of this pronouncement, though it was arguably dictum, the Department reversed

3/ This limited fee has also been referred to as a "base" fee. See, e.g., A. Otis Birch (On Rehearing), 53 I.D. 340, 342 (1931); Regulations for Rights of Ways Over Public Lands and Reservations, 36 L.D. 567, 568 (1908).

its position as to the nature of rights granted by the post-1871 rights-of-way. See Instructions, 46 L.D. 429 (1918).

In 1920, Congress enacted the Mineral Leasing Act, Act of February 25, 1920, 41 Stat. 437, 30 U.S.C. § 181 (1976). Insofar as the instant appeal is concerned, this Act provided for the leasing of certain minerals, including oil, in lands "owned by the United States." In Windsor Reservoir and Canal Co. v. Miller, 51 L.D. 27 (1925), the Department examined the question as to the applicability of the Mineral Leasing Act to reservoir sites granted under the Act of March 3, 1891, 26 Stat. 1095, 43 U.S.C. § 950 (1970). 4/ The 1891 Reservoir Act had long been construed as similar in scope to the 1875 General Right-of-Way Act. See Kern River Co. v. United States, 257 U.S. 147, 152 (1921).

In Windsor, one Frank C. Miller had applied for a prospecting permit for oil pursuant to the Mineral Leasing Act of 1920. In affirming the rejection of his prospecting permit application on the ground that the land was not subject to disposition under the leasing laws so long as the grant under the 1891 Reservoir Act subsisted, First Assistant Secretary Finney expressly referenced the Supreme Court decision in Rio Grande Western Ry. v. Stringham, supra, and concluded:

> From a careful consideration of the acts of Congress involved and the numerous decisions of the Department and the courts construing these acts, the Department is convinced that

4/ This Act was also repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793.

> such title has passed under the grant of right of way that a permit to prospect for oil and gas upon land situate in a reservoir site can not properly be granted.

51 L.D. at 32.

It is important to note that the Department did not imply that the right-of-way holder held title to any oil or gas underlying the right-of-way. On the contrary, the decision in Windsor, noting that the canal company had apparently issued leases for the land beneath the right-of-way, directed the land officer to notify the company "that the Department denies the right of the reservoir and canal company to lease any lands of the United States covered by its reservoir grant for the extraction of oil or gas therefrom." Id. at 34. Thus, the decision stated:

> A grant under said act passes no right, title, or interest in or to any mineral deposits underlying the land, or any right to prospect for, mine, and remove oil or gas deposits, either directly by the grantee or any lessee thereof. The title to such deposits remains in the United States, subject only to such disposition as may be authorized by law.

Id. Accord, Use of Railroad Right of Way for Extracting Oil, 56 I.D. 206, 211 (1937). In this holding, the Windsor decision reaffirmed the traditional view of the Department with respect to the pre-1871 rights-of-way. See Missouri, Kansas and Texas Ry., 33 L.D. 470 (1905). 5/

5/ While this was the consistent view of the Department and, indeed, was a necessary precondition to the 1930 Right-of-Way Leasing Act since it purported to authorize the issuance of leases for lands under rights-of-way whether deemed a base fee or an easement, it was not until 1957 that the courts agreed that title to the mineral estate in pre-1871 rights-of-way remained in the United States. See United States v. Union Pacific R.R., 353 U.S. 112 (1957).

The result of the Windsor decision, therefore, was to create an hiatus in the ability of the Government to lease its mineral deposits underlying rights-of-ways. To remedy this situation, the Department sought legislation expressly authorizing it to lease such lands. Pursuant to the request of Secretary Wilbur, Congress enacted the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 (1976). Section 1 of that Act provides:

> Whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement: Provided, That, except as hereinafter authorized, no lease shall be executed hereunder except to the municipality, corporation, firm, association, or individual by whom such right of way was acquired, or to the lawful successor, assignee, or transferee of such municipality, corporation, firm, association, or individual. [Emphasis supplied.]

It should also be noted that, while section 1 of the Act limited the issuance of leases to the holder of the right-of-way or its assigns, section 3 of the Act, 30 U.S.C. § 303 (1976), established a system by which the owner or lessee of adjoining lands could offer a bid of money or compensatory royalty for the right to extract the oil and gas underlying the right-of-way, through wells located on the adjoining land.

The following year, the Department had occasion to examine the scope of this Act in two different contexts. First, in Charles A. Son, 53 I.D. 270 (1931), Secretary Wilbur rejected the claim of appellants that the oil and gas deposits beneath a right-of-way granted under the 1875 Act were not subject to leasing under the 1930 Act because they were already subject to a

lease issued under the 1920 Act. In that case the Department expressly held that even though the lease issued to appellants described the entire section of land, it granted no rights to the oil and gas deposits underlying the right-of-way.

In A. Otis Birch (On Rehearing), supra, Assistant Secretary Edwards rejected the protest of the appellants therein that the oil and gas deposits lying beneath certain lands crossed by a railroad right-of-way issued under the 1875 Act were owned by appellants, as the adjacent landowners, and thus, not subject to leasing under the 1930 Act. Appellants held title to the adjacent lands by virtue of a patented oil placer claim. After reviewing the various judicial pronouncements on the topic, the Department concluded:

> In the light of these expressions of the Supreme Court, no other conclusion seems possible than that, upon the grant of the right of way, the land therein ceases to be public land and becomes private property, and any attempted appropriation thereof under the mineral or other public land laws would be void and ineffective, and that any patent issued pursuant to such an appropriation must be deemed inoperative as to the land in the right of way, the same as if it had been expressly eliminated therein by description.

Id. at 344. 6/

In 1942, however, the Supreme Court reexamined the dictum in Rio Grande Western Ry. v. Stringham, supra, and rejected it. In Great Northern Ry. v. United States, supra, Justice Murphy contrasted the nature of the pre-1871

6/ The holding in A. Otis Birch (On Rehearing), supra, is no longer good law. See Amerada Hess Corp., 24 IBLA 360, 83 I.D. 194 (1976).

grants with those authorized after that time, specifically adverting to the change in public and Congressional sentiment as to the large public land grants to railroads. Referring to the dictum in Stringham, analogizing the 1875 Act to the pre-1871 grants, the Court noted:

> The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. [Footnote omitted.]

Id. at 279. Thus, the Court held that the right-of-way granted by the 1875 Act was "but an easement" granting "no right to the underlying oil and minerals." The decision went on to note: "This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373." Id. (Emphasis supplied.)

In E. A. Wright, A-24101 (Nov. 5, 1945) Assistant Secretary Chapman took note of the Supreme Court's decision in Great Northern Ry. v. United States, supra, and stated "based upon the reasoning in that case * * * grants of rights-of-way for canals and ditches under the 1891 Act should be deemed easements, and previous decisions of the Department, based upon a repudiated contrary construction should no longer be followed." Nevertheless, the Assistant Secretary affirmed rejection of an oil and gas lease application on the ground that it was not in accord with the provisions of the 1930 Act,

expressly stating, "This Act prescribes the exclusive method of leasing oil and gas under rights-of-way acquired under the public land laws of the United States."

Subsequently, in Phillips Petroleum Co., 61 I.D. 93 (1953), Solicitor White examined precisely the contention pressed herein by the Regional Solicitor, viz., that in light of the decision in Great Northern Ry. v. United States, supra, deposits lying beneath rights-of-way granted under the 1875 Act were subject to leasing pursuant to the provisions of the Mineral Leasing Act of 1920. That case involved a right-of-way held by the Chicago and North Western Railroad Company, acquired in 1886 under the provisions of the 1875 Act. On May 1, 1945, Phillips Petroleum obtained an oil and gas lease for the lands surrounding part of the right-of-way pursuant to section 17 of the Mineral Leasing Act of 1920. No reference to the right-of-way was made in the lease.

In 1951, the railroad company applied for a lease of the deposits underlying its right-of-way pursuant to section 1 of the Act of May 21, 1930. Phillips Petroleum Company (Phillips), as lessor of the adjoining lands, was duly notified of its opportunity to submit a bid in accordance with section 3 of the 1930 Act. Instead, on March 5, 1952, Phillips protested the actions of BLM on the ground that the oil and gas deposits were already included in its outstanding lease. When its appeal was dismissed by the Assistant Director, BLM, Phillips appealed to the Secretary.

In Phillips Petroleum Co., supra, the Solicitor conducted an extensive review of the history of Departmental and judicial adjudication relating to

rights-of-way under the 1875 Act, which we have set forth above. Noting that the 1930 Act was adopted pursuant to the request of the Department, the decision stated that "[i]t is clear, therefore, that the 1930 act was proposed and enacted, not with the intent to supplement or to supplant the Secretary's authority under the Mineral Leasing Act of 1920, but with the intent of supplying authority that was deemed to be previously nonexistent." Id. at 97. Turning to the effect of the subsequent decision in Great Northern Ry. v. United States, supra, on the leasability of the deposits underlying 1875 rights-of-way, the Solicitor squarely held:

> I do not believe that the Great Northern decision served to make the Mineral Leasing Act applicable, along with the 1930 act, to oil and gas deposits underlying the rights-of-way granted by the 1875 act. As we have seen, the 1930 act had been enacted some 12 years previously to provide an authority which had herefore been deemed not to exist. The legislative history of the 1930 act shows that its enactment constituted an acceptance and confirmation by Congress of the Department's construction of the Mineral Leasing Act as inapplicable to oil and gas deposits underlying railroad rights-of-way granted under the 1875 act. The Department could not now overthrow this legislatively approved construction of the scope of the Mineral Leasing Act, merely upon the basis of the Supreme Court's change of view respecting the nature of the right enjoyed by the holder of a railroad right-of-way acquired under the 1875 act.

Id. at 98-99. Accordingly, Solicitor White held that Phillips had acquired no rights to the oil and gas deposit underlying the right-of-way by virtue of a lease issued pursuant to section 17 of the Mineral Leasing Act of 1920.

Phillips subsequently sought review of this decision in the United States District Court for the District of Columbia. In a decision

styled Phillips Petroleum Co. v. McKay, No. 5024-53 (June 17, 1955), Judge Schweinhart affirmed the Department on all questions. He noted that Phillips contended

> that after the decision in the Great Northern case, supra, the whole reason for the 1930 Act vanished. The Court does not believe this is so for the reason that the 1930 Act applies whether the right is a mere easement or a base fee, and also for the reason that the [Supreme Court] in its opinion stated that the minerals under rights of way were not frozen in place but were left free for development under the 1930 Act.

(Memorandum Opinion at 6).

Judge Schweinhart also examined the same argument advanced herein by the Regional Solicitor's Office that the oil and gas deposits beneath rights-of-ways were leasable under either the 1930 or 1920 Acts:

> The plaintiff contends also that the Act of May 21, 1930 did not repeal the 1920 Act and states that repeals by implication are not favored. The Court does not find that the question of repeal is involved. The Act of 1920 did not apply to gas and oil deposits underlying railroad rights of way and the Act of 1930 gave that authority to the Secretary of the Interior, which authority he did not have under the 1920 Act. The 1930 Act is specific legislation applying to that one subject, that is, mineral deposits under rights of way. Prettyman, J. in Shelton v. U.S., 165 F. (2d) 241, 83 U.S. App. D.C. 32, states that "generally, absent extraordinary results of such construction, a specific later statute rather than an earlier general one, applies to a given transaction described by both, i.e., generally by the earlier and specifically by the later."

(Memorandum Opinion at 6).

The last development of any real import occurred in 1960. After the Supreme Court decision in United States v. Union Pacific R.R., supra, which had affirmed the Department's consistent position that minerals underlying the pre-1871 rights-of-way were owned by the United States, the Acting Solicitor examined the question of the applicability of the Mineral Leasing Act of 1920 and the 1930 Rights-of-Way Leasing Act to the leasing of mineral deposits lying beneath rights-of-way. See Applicability of the Mineral Leasing Act to Minerals in Rights-of-Way, M-36597, 67 I.D. 225 (1960). In reviewing the judicial and Departmental changes which had occurred over the years, specific reference was made to the decision in Phillips Petroleum Co., supra. In particular, the statement that the enactment by Congress of the 1930 Act constituted Congressional acceptance and confirmation of the Department's view that the Mineral Leasing Act of 1920 was not applicable to lands underlying rights-of-way was reexamined.

The problem with such a position was that the 1930 Act applied only to oil and gas leasing. If, indeed, the Mineral Leasing Act of 1920 was generally inapplicable to rights-of-way, there would be no statutory authority by which the Department could issue leases for minerals other than oil and gas lands underlying rights-of-ways. The Acting Solicitor rejected this rationale as it applied to the general applicability of the Mineral Leasing Act. However, with reference to oil and gas leasing, the opinion clearly affirmed the Phillips Petroleum Co. decision:

> In a word all that was meant was that the Congress that enacted the 1930 act did so in acceptance of the Department's view that the 1920 act did not apply to rights-of-way and consequently

> the 1930 act was intended by that Congress to be and it must be deemed to be the only law authorizing the issuance of leases for oil and gas deposits under rights-of-way. I believe that there can be no quarrel with that reasoning. It is the general rule that special legislation will be deemed to supersede prior general legislation especially where there is reasonable evidence of that intent.

Id. at 227.

The adjudicative rules which have guided the Department since the 1960 Solicitor's Opinion may be succinctly stated: Oil and gas deposits underlying rights-of-way (be they pre-1871 or post-1871) are subject to leasing only pursuant to the 1930 Act; other leasable minerals underlying such rights-of-way are subject to leasing pursuant to the Mineral Leasing Act of 1920. 7/ A consistent and considerable line of cases have religiously adhered to this approach. See e.g., R. C. Beveridge, 50 IBLA 173 (1980); Alice Hays, 36 IBLA 313 (1978); Amerada Hess Corp., 24 IBLA 360, 83 I.D. 194 (1976); George W. Zarak, 4 IBLA 82 (1971), aff'd sub nom. Rice v. United States, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973).

The counsel for BLM attacks this entire line of adjudication as based in neither law nor logic. We emphatically disagree. There can be no gain-saying that a number of statements made and rationales employed over the years have, indeed, been repudiated by subsequent decisions. In no small

7/ Technically, it could be argued that insofar as pre-1871 rights-of-ways are concerned, only "reserved" minerals are subject to leasing under the 1920 Act. Practically, however, in light of the Supreme Court decision in United States v. Union Pacific R.R., supra, wherein the court treated the general exception of mineral lands in the grants to railroads as reserving minerals underlying the right-of-way in a pre-1871 grant, this distinction is of little import.

measure, of course, these inconsistencies and reversals were occasioned by the initial Supreme Court decision in Stringham and its subsequent repudiation in Northern Pacific. What the Regional Solicitor's memorandum clearly fails to come to grips with, however, is the exact language of the 1930 Act. Thus, it provides that the Secretary is authorized to lease deposits of oil and gas "in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement." The inclusion of the phrase "or mere easement" undercuts the essential assumption of the Regional Solicitor's view, for if a right-of-way was a "mere easement" the deposits beneath it would have been subject to leasing under the Mineral Leasing Act of 1920, even under the view of the law prevailing in 1930. No purpose would be served by including the alternative "or mere easement" unless it is assumed that Congress meant the 1930 Act to supersede the 1920 Act as it applied to oil and gas deposits.

The exact reason for the inclusion of this language is not clear. In Phillips Petroleum Co., supra, the Solicitor noted that the only reference to this phrase came in a letter from Secretary Wilbur to Representative Cramton in which he referred to rights-of-way granted under the 1891 Reservoir Act, and similar such acts as "more nearly in the nature of easements." Id. at 98 n.3. As the Solicitor pointed out, this reference was puzzling since the 1925 decision in Windsor Reservoir had clearly held that rights-of-way under the 1891 Act were limited fees.

Then, too, it might have been designed to cover various grants of a right-of-way which had been specifically held to be mere easements. See,

e.g., Smith v. Townsend, 148 U.S. 490, 498 (1893) (Act of July 4, 1884, granted "an easement not a fee in the land"); Railway Co. v. Alling, 99 U.S. 463, 475 (1878) (Act of June 8, 1872, granted "a present benefical easement."). The actual causation of the phrase's inclusion in the statute, however, is irrelevant. What is relevant is the fact that since Congress was acting on the assumption that the Department could not lease lands underlying rights-of-way where a base fee had been granted, the inclusion of the alternative "or mere easement" must be taken to include something else. Since lands beneath "a mere easement" would have been subject to leasing under the 1920 Act, even under the theories of law operative at the time the 1930 Act was adopted, it is clear that Congress intended to grant a separate, specific authorization for leasing lands beneath rights-of-ways. To the extent that the 1930 Act differs from the 1920 Act, it must be seen as the exclusive method of leasing oil and gas deposits underlying rights-of-ways, howsoever characterized and whensoever granted. 8/

The Regional Solicitor's memorandum at page 10 states:

> We do not mean to say that the 1930 Act has no application whatsoever. It does. It applies, exactly as Congress intended, to railroad rights-of-way that removed the lands they cross from the category of public lands. Those rights-of-way were all granted prior to a Congressional change of policy in 1871.

8/ In the second reply brief of appellee, counsel for BLM suggests that the debates in the 71st Congress show that the terms "easements" and "limited fee" were used almost interchangeably. But in this regard it must be remembered that the bill was drafted by the Department. It is thus the Department's contemporaneous construction which should be accorded great weight.

This analysis cannot be supported. Clearly, Congress did not intend, in 1930, to establish one system of leasing for pre-1871 rights-of-way and another for those issued after 1871. At the time Congress enacted the 1930 Act, the state of the law was that both pre-1871 grants, and grants issued under the 1875 and 1891 Acts were considered to grant "limited fees." It was not until 12 years later that the Supreme Court determined that the 1875 and 1891 grants were in the nature of easements rather than limited fees. The Regional Solicitor's memorandum presupposes a prescience in the 1930 Congress which is totally unsupported by its actions. Congress simply could not have known that the Stringham decision which served as the impetus for its actions would, itself, be reversed in Northern Pacific. Moreover, even were we to assume Congress was aware that the Stringham decision was vulnerable to subsequent Supreme Court repudiation, its inclusion of the phrase "or mere easement" totally belies the Regional Solicitor's argument that Congress intended to bifurcate treatment of rights-of-way.

We expressly hold that the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 (1976), is the exclusive authority for issuance of oil and gas leases for lands underlying railroad rights-of-way issued under the 1875 Act.

[2] The State Office, in its decision, stated that the oil and gas deposits underlying the two rights-of-way involved herein were already included in leases W-36324 and W-40091. This is demonstrably false.

In the first place, as the State Office was well aware, 9/ leases embracing rights-of-way other than reservoir sites, station grounds, or material sites, are issued for the entire area, without excluding the right-of-way. This has been the traditional and consistent view of the Department and was codified in the old BLM Manual. Thus, it was stated:

> The area of the lands in the reservoir or station grounds should be subtracted from the total area of the lands to be leased. While land embraced in other rights of way will not be excluded by description from the land covered by the lease, the lease will confer no right to either the land or oil and gas within the right of way. [Emphasis supplied].

VI BLM Manual 2.1.22 (Release 16, dated Oct. 4, 1954). In this regard, we would point out that the Manual statement merely reflected long-standing decisional authority. See, e.g., Phillips Petroleum Co., supra at 99; Charles A. Son, supra.

Second, it seems clear beyond peradventure that both the lessor and the lessees did not consider these rights-of-way to be under lease. Thus, on July 23, 1980, the respective lessees of leases W-36324 and W-40091 submitted a communitization agreement for sec. 24, T. 20 N., R. 93 W., to the Area Oil and gas Supervisor for his approval. Exhibit A which was attached to this agreement was a plat showing the communitized area. This plat shows the rights-of-way at issue herein with the notation "Tract No. 3 -- unleased."

9/ In its submission of Apr. 26, 1979, the State Director, Colorado, BLM, made specific reference to the BLM Manual provision set forth in the text, infra. Thus, BLM's decision on this point can only be said to be directly contrary to the facts as it knew them to be.

This communitization was approved by the Acting Area Oil and Gas Supervisor on July 30, 1980. In transmitting the approved unitization agreement the Acting Deputy Conservation Manager stated: "Until such times as a Tract 3 lease is issued (Grant of Easement W-0200642 and W-0200644 to Union Pacific Railroad Company), all monies attributable to this interest for production proceeds is to be placed in an interest bearing escrow account."

In light of the above, we find it incredible that the State Office would declare that the lands underlying the rights-of-way were presently under lease. At most, the memorandum of the Regional Solicitor merely indicated that insofar as 1875 easements were concerned, either the 1920 or the 1930 Act could be used to lease the underlying oil or gas deposits. Nothing in that opinion argued for the conclusion that all past leases of adjoining lands automatically included the deposits beneath the rights-of-way.

An oil and gas lease is, first of all, a contract. As such, its scope is determined by the intent of the parties signatory thereto. It is true, of course, that much litigation is engendered by different perceptions among parties to a lease concerning what was the nature of their agreement. But where, as here, all parties signatory to a lease are clearly in agreement as to its scope, we find it passing strange that the Government should subsequently take the position that the lease gave the lessee more rights than either the Government originally intended or the lessee expected.

Moreover, the position of the State Office could prove wildly disruptive of existing leases. If the mere fact of issuance of a lease adjoining

a post-1871 right-of-way, in the absence of a specific exclusion of the lands underlying the right-of-way, was sufficient to give the lessee a lease of the right-of-way minerals, any lease subsequently issued under the 1930 Act would be void. As a practical matter, leases under the 1930 Act were normally issued after the adjoining lands were leased. Thus, the overwhelming majority of 1930 Act leases issued for lands underlying post-1871 rights-of-ways would have been improperly issued. Without a doubt, acceptance of such an approach would engender endless and needless litigation. In any event, inasmuch as we have held that the 1930 Act is the exclusive authority for leasing oil and gas deposits underlying rights-of-way, the State Office holding is clearly without merit.

[3] Finally, we will address an issue extensively briefed by appellant, as well as by counsel for BLM, namely the authority and propriety of the Regional Solicitor to, in effect, direct the State Office to ignore clearly controlling Departmental precedents. Appellant argues:

> The Regional Solicitor's May 16, 1980 memorandum to the BLM states that he personally disagrees with the merits of an acknowledged Department policy which restricts oil and gas right-of-way leasing to the 1930 Act. Regional Solicitor's Memorandum at 1. But, instead of attempting to work a change through appropriate administrative procedures, the Regional Solicitor has unilaterally instructed local BLM officials in Colorado and Wyoming to deliberately disregard and override this binding, national policy. The resulting denial of Champlin's rights under the 1930 Act, as recognized by longstanding decisions issued at the Department's highest level and by regulations, is both improper in itself and unfairly prejudicial to Champlin.

(Statement of Reasons at 5). We find that the objections of appellant to the procedures utilized herein are well taken.

It seems elementary that an essential predicate of adjudicative practice is that subordinate officials follow and comport themselves to the directives of higher authority. Thus, this Board has expressly ruled that "when the appellate Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes Departmental policy which is fully binding upon the Bureau until such time as it is altered by competent authority." Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 228, 86 I.D. 234, 237 (1979). We might add that, inasmuch as the Board's authority is coextensive with that of the Secretary, its decisions in adjudications are equally binding on the Solicitor's Office. See Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980).

The instant situation involves a rule of law which has been repeatedly affirmed by entities as varied as this Board, Assistant Secretaries, and the Solicitor. It is, indeed, codified in the present regulations. See 43 CFR 3100.0-3(d)(1). It seems clear to us that this rule, until altered by competent authority, is entitled to full deference and adherence by both the State Office and the Regional Solicitor.

We recognize, of course, that situations can occur in which past Departmental precedents may be deprived of their controlling weight. Subsequent Congressional enactments or judicial reversals might well necessitate that prior Departmental practice be ignored. The instant case presents neither situation.

Nor does the mere fact that a subordinate official considers prior precedent to be in error justify that official in refusing to follow the precedent. Decisions of this Board are as effective and final as if the Secretary personally issued the decision. The Secretary, however, retains full supervisory authority to alter, modify or reverse any decision of this Board, or its predecessors, which he or she believes to be in error. See 43 CFR 4.5. Thus, if a decision in a specific case be deemed erroneous, the Secretary always retains the authority to assume jurisdiction and reverse the Board's original determination. If, on the other hand, longstanding precedent can no longer be supported, the Secretary, without waiting for a specific case, can cause such regulations to be issued as would effect the changes he deems proper. Certainly, a Regional Solicitor or a State Director would be well within the scope of his authority and responsibility in bringing to the Secretary's attention situations in which he believes that prior Departmental precedent should be overturned.

What cannot be accepted, however, is the implicit argument presented herein that every time a State Director or Regional Solicitor determines that past precedent is not in accord with the way the law ought to be interpreted the Regional Solicitor or State Director is invested with authority to ignore those precedents. Such a rule would lead to adjudicative chaos, with each State Director or Regional Solicitor determining for himself what shall be the law within their jurisdictions. We cannot assent to such a proposition. Departmental precedent, until changed or altered by competent authority, is fully binding on all Departmental employees.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge